IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

WRIT PETITION NO. 1013 OF 2006.

M/s Z.F. Steering Gears (India) ... Petitioner.
V/s.
Shri Ramchandra S. Tapkir ... Respondent.

Shri K.S. Bapat for the petitioner.

Shri Milind Deshmukh for the respondent.

CORAM : V.C.DAGA, J.

DATED : 17.4.2006.

JUDGMENT:

. Rule returnable forthwith.

. Shri Deshmukh waives service on behalf of the respondent. Heard finally by consent of parties.

. Perused petition.

2. This petition is directed against the order dated 1.1.2006 passed in Revision Application (ULP) No.190/2005d by the Industrial Court,Pune, confirming the order dated 13.10.2005 passed in Complaint (ULP) No.158/93 by the Third Labour Court, Pune, directing reinstatement of the complainant/ respondent herein to his original post with continuity of service with a direction to pay 50% backwages from the date of termination till reinstatement.

The Facts:

3. The petitioner-company states that the respondent was appointed as "Trainee" in the year 1991 and thereafter he was appointed for a period of 8 months i.e. from 14.10.1991 to 17.5.1992. Thereafter, he was re-appointed from 1.1.1993 till 30.6.1993 as " Trainee Assistant Furnace Operator". The training period of the respondent was further extended by another one month i.e. till 30.7.1993. According to the petitioner, on 26.7.1993, when the respondent reported for work in the second shift, he was asked about the incident which had occurred on 25.7.1993. He gave evasive replies. Thereafter, respondent did not report on duty and straightaway approached the Labour Court by filing complaint under MRTU & PULP Act, 1971; sometime in the month of October, 1993; complaining that he was, initially, appointed on 14.10.1991 for a period of 8 months and, thereafter, his services were continued without there being any order of continuation. He, thus, worked without any break for about one year.

4. According to the respondent-workman, on being asked, he was told by the management of the petitioner-Company; that his case for permanency was under consideration; as such he was allowed to

continue to work and is being given fresh appointment order for a period of one month. According to the respondent; he has worked in different shifts. He stated that, ultimately, on 26.7.1993, when he went to report on duty, he was not permitted to resume his work; which compelled him to file complaint under section 28(1) read with Items 1 (a),(d),(e) and (f) of Schedule IV of the MRTU & PULP Act, 1971.

5. On the aforesaid rival pleadings, the complaint was tried by the Labour Court.

6. At this juncture it will not be out of place to mention that prior to recording of the evidence the complainant- respondent had moved an application seeking production of documents and obtained order against the petitioner-employer directing production of documents. Details of the documents almost 13 in number; which were required to be produced by the employer; were furnished. The said application was replied by the management. Parties were heard. The Labour Court was pleased to direct the petitioner-employer to produce those documents. However, petitioner-employer did not produce those documents and tried to furnish explanation for not producing those documents. The complainant had sought production of documents with respect to

computer entries for the period 14.10.1991 to 25.7.1993.7.1993, during which period entries of payments made to the complainant were recorded. Petitioner-employer neither produced those documents nor furnished any explanation whatsoever for non-production thereof.

7. The respondent-workman filed affidavit in lieu of evidence. He was cross-examined by the Advocate for the petitioner-employer. Similarly, petitioner-management also examined on witness on their behalf.

8. During the course of cross-examination of the workman- respondent, certain suggestions were put to him relating to causing loss to the petitioner to the extent of Rs. 1,50,000/- which, ultimately, led to a police complaint against the respondent and others.

9. The trend of cross-examination suggests that the complainant- respondent was very much in the employment of the petitioner-Company right upto 26.7.1993. It was suggested in the cross-examination that due to loose oil bolt of the furnace; some loss was caused to petitioner; which, ultimately, resulted in abandonment of service by the respondent-workman.

10. The respondent-workman was cross-examined so far as period of his un-employment is concerned, to which respondent-workman answered that he tried to find out alternate job but he could not get it; that is how he remained unemployed after termination of his services.

11. The petitioner-employer examined one Shri Prashant Kothari who has admitted that the complainant was engaged in Heat Treatment Department on 30.6.1993 as Trainee Assistant Furnace Operator. He was, thereafter, given one month's extension at the instance of the Head of the Treatment Department. The said witness further deposed that on 26.7.1993, Head Of the Department called on him and informed him that the Company had suffered heavy losses due to leakage of oil. He was also informed that it could be a mischief by one of its employees working in Head Treatment Department. According to him, there were 8 workmen on the that day working in second and third shift including the respondent-complainant. Due to loss suffered by the petitioner-company, it had to make preliminary enquiry. The respondnt-complainant was also called during the course of preliminary enquiry; he pleaded ignorance and asserted that he did not commit any misconduct. According to him, the

complainant chose to remain absent from duty from 26.7.1993 till 31.7.1993 and since then he continuously remained absent from duty, with the result his name was struck of from the muster roll.

12. Shri Kothari further deposed that the services of the respondent were never terminated with effect from 26.7.1993. He also stated on oath that no notice with regard to absenteeism was issued to the respondent-complainant. He also stated that respondent did not complete 240 days during the period 26.7.1992 to 26.7.1993 and that the complainant was not a permanent employee. He also stated on oath that the petitioner-Company had lodged a police complaint because of loss of furnace oil.

13. This witness Shri Kothari was cross-examined at length. During the course of cross-examination this witness was confronted with a question; whether Mr.Wadnekar instructed Personnel Deptt. to allow complainant overtime on various dates viz; 26.6.1992, 8.6.1992, 27.6.1992, 26.7.1992, 5.8.1992, 3.8.1992,1.8.1992 and 6.1.1991. The witness could not answer pleading absence of knowledge. When he was asked whether the complainant had met with an accident on 14.7.1993, he could not give any reply to this question. Most

of the answers given in the cross-examination were evasive.

14. The Labour Court on appreciation of evidence was pleased to hold that the complainant- respondent has proved continuous employment for more than 240 days with the petitioner and that his services were terminated without following provisions of section 25-f of the industrial Disputes Act.

15. Being aggrieved by the order of the Labour Court dated 13.10.2005, revisional jurisdiction of the Industrial Court was invoked. The Industrial Court after hearing parties was pleased to record findings as under:

> . "Now it is pertinent to note that the Document at serial number 8 at Ex.42 is detail in respect of payment to the complainant from 14.10.91 to 25.6.93 as recorded in computer. It is pertinent to note that say Ex.53 does not speak even remotely about those computer details in respect of salary payments of complainant nor the respondent has produced the same. The learned trial Judge, has has drawn adverse inference against respondent for not producing the documents. It is pertinent to note that respondent is well aware about the litigation between him and complainant. Therefore, it was not desirable on his part to destroy the document. It is also pertinent to note that the respondent has come with a case that he has destroyed most of the documents mentioned in Ex.42 only after he has lost the battle upto High Court. While submitting his say Ex.42 at initial stage he kept mum and did not state

> even remotely that most of documents from Ex.42 are destroyed by him. On the contrary, while giving his say to Exh. 42 he has challenged the relevancy of documents and has submitted that he is not sure about possession of documents. Now, on this background the xerox copies of documents mentioned at Exh.42 has been confronted to the witness of respondent in his cross-examination. It is pertinent to note that witness Shri Prakash Kothari in his cross-examination was specifically asked about the work done by respondent from 29.5.92 till 1.1.93 with the help of various documents except showing ignorance witness Kothari did nothing. It is pertinent to note that Shri Kothari has denied the suggestion given to him in his cross-examination about the work done by complainant on this background. Learned trial Judge has considered the xerox copy of document mentioned in Ex.42 by drawing adverse inference against the respondent to conclude 240 days service of complainant in a calendar year preceding to date of termination."

16. The aforesaid orders of the Courts below are subject matter of challenge in this petition filed under Articles 226 & 227 of the Constitution of India.

17. At the outset, it will not be out of place to mention that on 5 occasions, this matter was adjourned to explore the possibility of settlement. However, settlement could not be arrived at between the parties, with the result, petition was heard finally by consent of parties.

Submissions:

18. Shri Bapat, learned Counsel appearing for the petitioner contends that the respondent-workman did not complete 240 days service as such provisions of section 25-F of the Industrial Disputes Act did not attract warranting reinstatement on the ground of breach thereof. He submits that it was not necessary for the petitioner to produce documents demanded by the respondent. The documents could not be produced since they were not preserved by the petitioner-employer. He urged that until existence thereof is proved, no adverse inference could have been drawn by the Court below. Shri Bapat sought to place reliance on the decision of the Apex Court in the case of **Surendranagar District Panchayat vs.Dahyabhai Amarasingh (2005) 8 SCC 750** in support of his submission. Shri Bapat also urged that no full backwages could have been awarded by the Courts below. He also placed reliance on the judgment of the Apex Court in the case of **U.P.State Brassware Corporation Ltd. vs. Uday Narain Pandey (2006) 1 SCC 479**

19. Per contra, learned Counsel for the respondent-workman relying upon the findings recorded by the Courts below tried to support the impugned orders and prayed for dismissal of the petition.

Consideration:

20. Having heard rival parties, this Court not being a Court of appeal is not expected to reappreciate the evidence. This Court is expected to examine whether the view taken by the Court below is a reasonable and possible view and whether the view taken can be supported on the basis of material available on record.

21. Examined from the above angle, it is not in dispute that a specific application was made by the complainant - respondent seeking production of certain documents so as to establish his case. He has deposed about his employment with the petitioner-employer almost for a period of 3 years, without any break. Employment, may be with some breaks, has been admitted by the petitioner-employer. It is not disputed that the respondent-complainant was in the employment of the petitioner. The dispute only relates to the duration of the employment with the petitioner-Company.

22. The petitioner-company was expected to preserve documents with respect to employment of the workman- present respondent, especially, when litigation was pending in the Labour Court. The

documents were not maintained by the petitioner-Company.

23. The respondent-complainant has immediately filed complaint almost within 90 days from the date of alleged termination. It is difficult to believe that when litigation was pending in Court the employer would dispose of or destroy the documents; which were vital to contest litigation pending in the Court.

24. In view of the submissions made, the labour Court was pleased to direct the petitioner-employer to produce thirteen (13) documents. The document at Sr.No.8, relating to payment entries recorded in the computer; for the period 14.10.1991 to 25.6.1993. were neither produced by the petitioner nor any explanation was furnished as to why those documents could not be produced. Even existence of these documents were also not denied by the petitioner-employer. In the absence of any explanation in this behalf, the Court below was perfectly justified in drawing an adverse inference.

25. Petitioner tried to place reliance on the judgment of the Apex Court in the case of Surendranagar District Panchayat (supra) to contend that unless existence of document is proved, the

Court is not entitled to draw an adverse inference. In this case, existence of document at Sr.No.8 was not in dispute. Non-existence of such documents was not proved. So far as this document is concerned, nowhere petitioner-employer has stated that the said document is not in existence. As a matter of fact, no reply has been filed. No explanation has been furnished; why said document could not be produced. If that be so, this was a fit for drawing an adverse inference against the employer to hold that the document would not have helped the petitioner-employer to establish its case. In this behalf, it will be profitable to refer to some of the judgments of the Apex Court in the cases of (1) Hiralal vs. Badkulal AIR 1953 SC 225 (2) Khushalbhai Mahijibhai Patel vs. Firm of Mohamadhussain Rahimbux -AIR 1981 SC 977 (3) Gopal Krishnaji vs. Mohd. Haji Latif -AIR 1968 SC 1413. In the case of K.M. Patel vs. Firm of Mohamadhussain (Supra), the Apex Court has said as under:

> . "The non-production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and a presumption has therefore to be raised against it that if such evidence had been produced, the same would have gone against the case propunded by it."

26. If the aforesaid circumstance brought on

record is taken into account, the inference drawn by the Court below, by no stretch of imagination can be said to be perverse. The impugned orders are, therefore, liable to be sustained on this count alone.

27. Incidentally, it will not be out of place to mention that the trend of cross-examination if seen, the employer tried to make out a case that the respondent-complainant caused loss to the petitioner-Company on 26.7.1993 and therefore,complainant has abandoned his job. This trend of cross-examination suggests that the workman himself has abandoned job. If that be so, it was obligatory on the part of the employer to give notice to the workman calling upon him to resume his duties with a right to hold enquiry against him. The law laid down by the Apex Court in the case of M/s Scooters India Ltd vs Mohammad Yaqub, AIR 2001 SC 227 and also this Court in the case of Gaurishankar Vishwakarma vs. Eagle Spring Industries P.Ltd. 1988(1) CLR 38) has not been followed by the petitioner-employer.

28. So far as backwages are concerned, learned Counsel appearing for the petitioner-employer has placed reliance on the judgment of the Apex Court in the case of **U.P. State Brassware Corporation Ltd.**

vs. Uday Narain Pandey (supra), which lays down that plea with respect to entitlement of backwages is required to be raised by the workman and he has to prove that he was not gainfully employed during the period for which backwages are claimed. Onus to plead and prove lies on the workman. The respondent himself has stated in his examination- in- chief that he was not gainfully employed. However, material adverse to the interest of the petitioner was brought on record by cross-examiner. The respondent-workman has stated in the cross-examination as under:

> . "After termination, I tried to get job as Furnace Operator, with Fateja Firge, Ahmednagar forging. I have no documentary evidence to show that I made application for the job. It is not true that since date of termination till today I did not work as Furnace Operator. It is not true, therefore, I have no experience as Furnace Operator. It is not true that work of Furnace Operator is a skilled work. Since termination till today, I am unemployed. Since termination till today, my brother in law maintained me."

29. There is no evidence produced from the side of the employer to establish that the respondent-workman was, at any point of time, gainfully employed. In the circumstances, it is not possible to hold that the order of the Court below directing 50% backwages suffers from any perversity. The Labour Court has exercised its discretion judiciously.

30. Taking overall view of the matter, no fault can be found with the impugned order. In the result petition is liable to be dismissed.

31. Petitioner is directed to comply with the impugned order on or before 30.6.2006, failing which the backwages shall carry further interest @ 10% p.a. w.e.f. 1.6.2006.

. Rule stands discharged in terms of this order with no order as to costs.

(V.C.DAGA,J.)